In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-835

EUNICE W. FISHER, PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner is employed by the Bureau of Apprenticeship and Training ("BAT") of the United States Department of Labor as a secretary-stenographer. She seeks certiorari from a decision of the Court of Appeals for the Sixth Circuit, holding that there was substantial evidence supporting the finding that the denial of her application for promotion to a supervisory position within BAT was not the result of discrimination on account of her sex. The decision of the court of appeals is correct, and further review by this Court is not warranted.

Petitioner applied in September 1972 for a promotion within BAT to the position of Apprenticeship and Training Representative ("ATR"). On September 29, 1972,

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[1]W.J. Usery, Jr., the current Secretary of Labor, has been substituted for John T. Dunlop pursuant to Rule 48(3) of the Rules of the Court.

she was notified by the Regional Personnel Officer of the Department of Labor that her application had been denied because she did not qualify for the position to which she had sought to be promoted. Petitioner thereafter filed a complaint with the office of Equal Employment Opportunity of the Department of Labor, in which she alleged that BAT had discriminated against her on account of her sex by failing to provide adequate training programs for women to permit them to qualify as ATRs. Following an investigation by that office, the Department of Labor proposed that certain steps be taken to remedy the underrepresentation of women as ATRs—specifically, the Department proposed (1) that petitioner "be given priority consideration for the next available [ATR] Trainee position in BAT"; (2) that BAT initiate procedures through the Civil Service Commission to determine whether the qualification standards for ATR positions "allow women to compete equally with male applicants"; and (3) that BAT establish "an upward mobility program for nonprofessional women in both clerical and nonclerical positions which will provide training opportunities to allow career advancement and development" (Pet. App. 9a).

Petitioner, being dissatisfied with these measures, requested and obtained a hearing before a complaints examiner, who concluded that petitioner had not been discriminated against individually on account of her sex. On October 18, 1973, the Department of Labor adopted in full the findings and recommendations of the complaints examiner. In addition, the Department ordered BAT to begin implementing the measures that had been proposed earlier (Pet. App. 11a). Petitioner appealed the Department's final decision to the Civil Service Commission's Board of Appeals and Review, which affirmed the Department's decision (Pet. App. 1a-6a).

Petitioner then filed this action in the district court seeking review of the finding that she had not been discriminated against because of her sex. The district court, after reviewing the administrative record, held that "on the basis of substantial evidence in the record to support the finding that [petitioner] was not individually discriminated against, the administrative findings should not be disturbed" (Pet. App. 15a). The court of appeals affirmed (Pet. App. 17a).

The only issue in this case is whether the denial of petitioner's application for a promotion to a supervisory position within BAT resulted from discrimination against her on the basis of sex. Both courts below determined that substantial evidence supported the Commission's finding that petitioner had not been the subject of gender-based discrimination. Further review of this factual matter is not warranted. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n. 2; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

Moreover, the decision of both courts below was correct. Although certain of BAT's past personnel practices may have contributed to the present under representation of women as ATRs, petitioner failed to show that her application for a promotion had been denied because of her sex.[2]

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[2]In the court of appeals, petitioner did not claim that she was entitled to a trial *de novo*, although she did assert that the standard of review in federal employee discrimination cases was other than substantial evidence review (Appellate Brief, p. 7). Petitioner does not appear to preserve that contention in this Court. Accordingly, this case does not present the issue in *Chandler* v. *Roudebush, et al.*, No. 74-1599, of the standard of review in federal employee discrimination cases, and there is no occasion to defer acting on this petition until *Chandler* is decided.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.